

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 18, 2014

v

FITZROY ULRIC GILL, II,

No. 313761
Saginaw Circuit Court
LC No. 12-037302-FC

Defendant-Appellant.

Before: RONAYNE KRAUSE, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

Defendant, Fitzroy Ulric Gill II, appeals as of right his convictions, following a jury trial, of kidnapping,¹ second-degree criminal sexual conduct (CSC II),² assault with intent to commit criminal sexual conduct,³ and third-degree criminal sexual conduct (CSC III).⁴ The trial court sentenced Gill to serve 220 months' to 30 years' imprisonment for kidnapping, 100 months' to 15 years' imprisonment for CSC II, 65 months' to 10 years' imprisonment for assault with intent to commit CSC II, and 100 months' to 15 years' imprisonment for CSC III. We affirm Gill's convictions and sentence.

I. FACTS

A. THE 13-YEAR-OLD COMPLAINANT

The 13-year-old complainant testified that, on the morning of April 24, 2012, she was at a school bus stop when Gill pulled up in a white Grand Prix with chrome wheels. According to the 13-year-old complainant, Gill asked her name, age, and who her mother was. She told him her name, her mother's name, and that she was 13 years old. Gill responded that his name was "Terrell" and that her mother had told him that he could give the complainant a ride to school.

¹ MCL 750.349(1)(c).

² MCL 750.520c(1)(c) (during the commission of a felony).

³ MCL 750.520g(1).

⁴ MCL 750.520d(1)(b) (force or coercion).

According to the 13-year-old complainant, she got in Gill's car and the doors locked when he pulled away from the bus stop. He drove in a different direction from the school. When the 13-year-old complainant asked him where he was going, he told her that he was just making a stop. Gill stopped at a dead end and touched the 13-year-old complainant's thigh. She pushed Gill's hand away and asked what he was doing, and he responded that he was reaching for something.

The 13-year-old complainant testified that Gill resumed driving. Gill then parked on a second dead-end street, where he put his hand in her pants and touched her on top of her underwear. She struck Gill's hand with her binder and demanded to know what he was doing. Gill began driving again, and she told him, "let me off right here" She testified that Gill pulled to the side of the road and let her out of his car.

After the 13-year-old complainant arrived at school, another student reported to her teacher that she was crying. The 13-year-old complainant subsequently told the teacher about the incident with Gill, and gave a description of Gill and his vehicle to the police.

B. THE ADULT COMPLAINANT

The adult complainant testified that she had known Gill for about three months and knew him as "Terrell Taylor." She testified that she previously had a sexual relationship with Gill, but had stopped speaking with him after a disagreement.

The adult complainant testified that Gill texted her on the morning of April 24, 2012 and asked if he could come over. Gill arrived between 9:00 and 9:30 a.m. and began asking her for sex, which she declined. The adult complainant testified that Gill got on top of her on the couch on which they were sitting and penetrated her. She testified that Gill left her residence after she scratched Gill's face and punched him.

According to the adult complainant, she did not initially call the police because she did not believe that they would do anything. However, later that day, she learned that a man in a vehicle matching Gill's car had picked up a girl. The adult complainant eventually left a message on a hotline answering machine, in which she stated that she had information about the girl's assault and that Gill had sexually assaulted her. When Detective David Kerns contacted her, she provided him with Gill's employer, cell phone number, and a description of his vehicle.

C. POLICE EFFORTS TO LOCATE GILL

Detective Kerns testified that he was unable to locate a man named Terrell Taylor in the Saginaw area. He gave the cell phone number to central dispatch, and discovered that the cell phone was contracted by a person named Mike Taylor. Detective Kerns testified that, again, there was no information on a Michael Taylor. However, he eventually tied the phone number to Gill through a cell phone number that was used in a different incident and registered to Gill.

D. PROCEDURAL HISTORY

Before trial, Gill moved to sever the joint proceedings on the basis that the incidents with the 13-year-old complainant and the adult complainant were separate and unrelated. The trial

court denied the motion on grounds that a reasonable juror could conclude that the two complaints were connected acts or were part of a single scheme or plan aimed at Gill's goal of obtaining sexual gratification.

Gill also moved to quash the information related to the 13-year-old complainant, asserting that he had not restrained her because she voluntarily entered his vehicle and he did not prevent her from exiting it. The trial court denied Gill's motion to quash.

At sentencing, the prosecutor urged the trial court to assess 10 points for offense variable 19 (OV 19), concerning interference with the administration of justice. The prosecutor asserted that Gill used a false name to avoid detection. Gill contended that he gave the adult complainant a false name before any charges or investigation had begun, and thus the false name was not used for the purposes of interfering with justice. The trial court assessed 10 points for OV 19 on the basis that Gill's false name was an attempt to prevent identification by witnesses.

II. JOINDER

A. STANDARD OF REVIEW

"To determine whether joinder is permissible, a trial court must first find the relevant facts and then decide whether those facts constitute 'related' offenses for which joinder is appropriate."⁵ We review for clear error the trial court's findings of fact and review de novo questions of law.⁶

B. LEGAL STANDARDS

The trial court may join offenses into a single trial if those offenses are sufficiently related.⁷ MCR 6.120(B) provides that offenses are related if they are based on

- (a) the same conduct or transaction, or
- (b) a series of connected acts, or
- (c) a series of acts constituting parts of a single scheme or plan.

C. APPLYING THE STANDARDS

Gill contends that the facts did not support the trial court's conclusion that joinder was appropriate. We disagree.

⁵ *People v Williams*, 483 Mich 226, 231; 769 NW2d 605 (2009).

⁶ *Id.*

⁷ MCR 6.120(B).

In *People v Abraham*, this Court determined that offenses were related when they “occurred within a couple of hours of each other in the same neighborhood, with the same weapon, and were part of a set of events interspersed with target shooting at various outdoor objects.”⁸

We conclude that the circumstances here are analogous with those in *Abraham*. Here, two sexual assaults took place within an hour or two of each other in Saginaw. The adult complainant based her decision to report Gill to the police in part on reports that he assaulted the 13-year-old complainant earlier in the morning. The complainants each identified Gill as the perpetrator of their assaults. We conclude that the trial court did not err by concluding that the offenses were a series of connected acts. Because we affirm on this basis, we decline to review the trial court’s alternative holding that the actions were part of a common plan or scheme.

D. USE OF A “REASONABLE JUROR” STANDARD

Gill briefly contends that the trial court erred in applying a “reasonable juror” standard when determining whether the complaints were sufficiently related.

Parties abandon issues on appeal if they “merely announce their position and leave it to this Court to discover and rationalize a basis for their claims.”⁹ A party must provide authority for its assertions on appeal.¹⁰

Gill asserts that neither MCL 6.120(B) nor *Williams* supports a reasonable juror standard, but he provides no authority, legal analysis, or discussion in support of his assertion. We note that, in the similar and related context of other-acts evidence, this standard may be an appropriate standard for a conditional, initial factual determinations.¹¹ We conclude that Gill has abandoned this assertion on appeal because he has failed to support it.

E. ADMISSIBILITY UNDER MRE 404(b)

Gill also contends this Court must vacate his convictions because the trial court did not consider whether the evidence would be admissible under MRE 404(b). Again, Gill fails to support this assertion with legal authority or with any significant analysis. We conclude that Gill has abandoned this issue.¹²

⁸ *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

⁹ *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004).

¹⁰ *Id.*

¹¹ See *People v VanderVliet*, 444 Mich 52, 68 n 20; 508 NW2d 114 (1993); *Huddleston v United States*, 485 US 681, 690; 108 S Ct 1496; 99 L Ed 2d 771 (1988).

¹² See *Matuszak*, 263 Mich App at 59.

III. SUFFICIENCY OF THE KIDNAPPING EVIDENCE

A. STANDARD OF REVIEW

A claim that the evidence was insufficient to convict a defendant invokes that defendant's constitutional right to due process of law.¹³ Thus, this Court reviews de novo a defendant's challenge to the sufficiency of the evidence supporting his or her conviction.¹⁴ We review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the prosecution proved the essential elements of the crime beyond a reasonable doubt.¹⁵

B. LEGAL STANDARDS

Restraint is an essential element of the crime of kidnapping:

(1) A person commits the crime of kidnapping if he or she knowingly restrains another person with the intent to do 1 or more of the following:

* * *

(c) Engage in criminal sexual penetration or criminal sexual contact with that person.^[16]

For the purposes of kidnapping, a defendant can restrain a person by either (1) restricting the person's movements, or (2) confining the person:

As used in this section, "restrain" means to restrict a person's movements or to confine the person so as to interfere with that person's liberty without that person's consent or without legal authority. The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts.^[17]

Consent is a complete defense to kidnapping if the defendant did not obtain consent by fraud, duress, or threats.¹⁸ "'Fraud' is defined as '[a] knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.'"¹⁹

¹³ *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992). See *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

¹⁴ *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006).

¹⁵ *Id.*

¹⁶ MCL 750.349.

¹⁷ MCL 750.349(2).

¹⁸ *People v La Porte*, 103 Mich App 444, 448-449; 303 NW2d 222 (1981).

C. APPLYING THE STANDARDS

Gill asserts that the prosecutor presented insufficient evidence on restraint because he did not force the 13-year-old complainant into his car and he let her out of his vehicle as soon as she asked to be let out. We disagree.

Here, the 13-year-old complainant testified that Gill told her he would take her to school. She entered his car, and the car doors locked when Gill drove away from the bus stop. Instead of taking the complainant to school, Gill drove her to two dead-end streets, where he sexually assaulted her.

Even if the jury concluded that Gill eventually let the 13-year-old complainant out of his car when she asked, a reasonable jury could have found that Gill restricted her movements and interfered with her liberty. Gill told the complainant that he would give her a ride to school. She entered his car voluntarily, but for the limited purpose of obtaining a ride to school. Gill then did *not* drive the complainant to school, but instead drove her to isolated places where he sexually assaulted her. Gill thus fraudulently obtained the consent that allowed him to restrict her liberty in the first place. We conclude that, viewing these facts in a light most favorable to the prosecutor, a reasonable juror could conclude that Gill restricted the 13-year-old complainant's movements so as to restrict her liberty without her consent.

IV. PROSECUTORIAL MISCONDUCT

A. STANDARD OF REVIEW AND ISSUE PRESERVATION

Gill recognizes that his prosecutorial misconduct claims are unpreserved. We review unpreserved claims of prosecutorial misconduct for plain error affecting the defendant's substantial rights.²⁰ An error affects the defendant's substantial rights when that error prejudices the defendant.²¹

B. LEGAL STANDARDS

The prosecutor has committed misconduct if the prosecutor abandoned his or her responsibility to seek justice and, in doing so, denied the defendant a fair and impartial trial.²² We evaluate instances of prosecutorial misconduct on a case-by-case basis and review the prosecutor's comments in context.²³

¹⁹ *People v Dewald*, 267 Mich App 365, 383; 705 NW2d 167 (2005), quoting Black's Law Dictionary (7th ed).

²⁰ *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008); *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

²¹ *Unger*, 278 Mich App at 235; *Carines*, 460 Mich at 764.

²² *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003); *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

²³ *Dobek*, 274 Mich App at 64.

C. APPLYING THE STANDARDS

Gill first contends that the prosecutor committed misconduct by asking the 13-year-old complainant leading questions. We disagree.

When the defendant's prosecutorial misconduct argument is "essentially an evidentiary issue framed as prosecutorial misconduct," this Court determines whether the prosecutor acted in good faith.²⁴ "A prosecutor's good-faith effort to admit relevant evidence does not constitute misconduct."²⁵

Here, the prosecutor questioned the 13-year-old complainant as follows:

Q. . . . Now, when you hit him, he didn't let you out, at that point?

A. He, like—

Q. Not right then?

A. No, we kept going. And I told him to let me out, like, at the railroad tracks on 27th.

Q. Okay. And did he eventually let you out?

A. Yeah.

* * *

Q. Did you, after he touched you and put his hand on your vagina, did you want out of that car?

A. Yeah.

Q. Okay. And you—he did let you out, but did he let you out the very second you asked or did he let you out later?

A. Yeah, he said—he pulled to the side and he let me out.

Gill did not challenge the prosecutor's use of leading questions. Given the context of the prosecutor's questions, we conclude that the prosecutor was attempting, in good faith, to admit the relevant evidence of when Gill let the 13-year-old complainant out of his car. The prosecutor's use of leading questions did not deprive Gill of a fair and impartial trial.

²⁴ *Id.* at 70-71.

²⁵ *Id.* at 70.

Gill next contends that the prosecutor committed misconduct by “gratuitous use of the word ‘vagina’” in a way that was intended to inflame the jury. We disagree.

A prosecutor may commit misconduct if he or she deliberately attempts to prejudice the jury by using certain terms.²⁶ Here, the prosecutor asked the 13-year-old complainant whether Gill put his hand on top of the 13-year-old complainant’s vagina and whether, “after he touched you and put his hand on your vagina, did you want out of that car?” Given the context of the prosecutor’s use of the word “vagina” and the fact that the prosecutor had to prove that Gill touched the complainant’s intimate parts,²⁷ we conclude that the prosecutor did not deliberately attempt to prejudice the jury by using the word “vagina.” The prosecutor’s use of this word did not deprive Gill of a fair and impartial trial.

V. OV 19

A. STANDARD OF REVIEW

This Court reviews the sentencing court’s assessment of a sentencing guidelines variable for clear error.²⁸ The trial court’s assessment must be supported by a preponderance of the evidence.²⁹ The proper interpretation and application of the sentencing guidelines is a question of law that this Court reviews de novo.³⁰

B. LEGAL STANDARDS

The trial court should assess OV 19 if the defendant “interfered with or attempted to interfere with the administration of justice or the rendering of emergency services.”³¹ This offense variable provides in part that assessment of 10 points is appropriate when the defendant interfered in the administration of justice:

(c) The offender otherwise interfered with or attempted to interfere with the administration of justice10 points

²⁶ See *People v Bahoda*, 448 Mich 261, 266-267, 271; 531 NW2d 659 (1995) (racial or ethnic remarks).

²⁷ See MCL 750.520(c)(1)(c) and MCL 750.520a(q).

²⁸ *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012).

²⁹ *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

³⁰ *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

³¹ MCL 777.49(c).

C. APPLYING THE STANDARDS

Gill contends that the trial court improperly scored OV 19 because he did not interfere with the administration of justice by providing a false name to private individuals for private reasons. We disagree.

Providing a false name to a law enforcement officer constitutes interference with their investigatory function, which is interference with the administration of justice under MCL 777.49(c).³² Conduct directed at a victim can constitute interference with the administration of justice when it prevents the discovery and prosecution of the defendant's crimes.³³

Here, Detective Kearns testified about the extensive process that he had to go through to locate Gill, due in part to the false names that Gill gave the complainants and his cell phone company. The trial court assessed 10 points for OV 19 because "the way [Gill] gave a false name to these witnesses . . . would be an attempt to prevent his identification, because he's giving them a false name." Gill directed conduct at the victims in this case by providing a false name, and his conduct interfered with law enforcement's investigatory function by making discovery and prosecution of Gill more difficult. Thus, we conclude that the trial court's decision to assess OV 19 at 10 points was not clearly erroneous.

VI. CONCLUSION

We conclude that the trial court did not err by denying Gill's motion to sever because the complaints were sufficiently related as a series of connected acts. The evidence was sufficient to support the jury's determination that Gill restrained the 13-year-old complainant and deprived her of her liberty. Gill's claims of prosecutorial misconduct and sentencing error are without merit.

We affirm.

/s/ Amy Ronayne Krause
/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck

³² *People v Barbee*, 470 Mich 283, 287-288; 681 NW2d 348 (2004).

³³ *People v Endres*, 269 Mich App 414, 421; 711 NW2d 398 (2006), overruled in part on other grounds, *Hardy*, 494 Mich at 438 n 18.